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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-824

ROBERT S. PERSKY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Robert S. Persky prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 4, 1974 in this proceeding.

Opinion Below

The opinion of the Court of Appeals, reprinted in the appendix hereto, is reported at —— F.2d —— (2d Cir. 1974) [not yet officially reported]. An oral opinion was rendered by the District Court for the Southern District of New York, and a copy of that decision is reprinted in the appendix hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on November 4, 1974. A timely petition for rehearing and suggestion for hearing *en banc* was denied on December 4, 1974. This petition for writ of certiorari is timely made. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and under the general supervisory powers which this Court exercises over the lower federal courts.

Questions Presented

1. Whether the holding in *Mesarosh* v. *United States*, 352 U.S. 1 (1956), requiring that a defendant be accorded a new trial when the Government, in subsequent proceedings, takes such actions toward one of its chief witnesses against defendant as to cast severe doubt over the veracity of said witness' testimony at defendant's trial and which demonstrates on the part of the Government an utter disbelief in his credibility, is applicable to the instant case.

2. Whether the lower courts, in denying defendant's motion for a new trial on the ground of newly discovered evidence which indicated the likelihood of perjury by a major government witness at defendant's trial applied the correct evidentiary standard in that they stated that the newly discovered evidence must be such that the jury, being apprised of it "would probably" vote to acquit, whereas the correct evidentiary standard in such circumstances appears to be whether the jury, in light of the new evidence "might" reach a different verdict.

Statute Involved

Title 15, U.S.C. § 78ff(a):

> (a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of Section 780 of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Statement of the Case

Petitioner Robert S. Persky was indicted along with others in March, 1973 for filing a false annual report with the Securities and Exchange Commission and for conspiracy to file same in violation of 15 U.S.C. §§ 78-0 and 78-ff respectively. In May, 1973 the jury, after long deliberation acquitted petitioner of the conspiracy charge, and reconvening the next day, found him guilty on the substantive count after the judge had delivered an "Allen charge."

Petitioner appealed the verdict on the grounds that (1) the trial judge committed reversible error when, given the opportunity by the jury's not guilty verdict on the conspiracy count and their retirement for the night, he failed to instruct them the next day to disregard the hearsay evidence which was admissible only as to the conspiracy count; (2) the conspiracy verdict constituted a *res judicata* against the substantive verdict, since the substantive count incorporated by reference the heart and body of the conspiracy count; and (3) the trial court erred in refusing to allow questions in the *voir dire* requested by petitioner aimed at uncovering possible bias by jurors against attorneys. The Court of Appeals for the Second Circuit affirmed the conviction, *United States* v. *Zane,* 495 F.2d 683 (2d Cir. 1974), and this Court denied a petition for writ of certiorari, Dkt. No. 73-1910, 43 U.S.L.W. 3239 (U.S. October 22, 1974).

At trial, the Government's case against petitioner rested largely upon the testimony of Peter Galanis and Akiyoshi Yamada ("Yamada"). Yamada had originally been indicted along with petitioner as a co-conspirator, and stood accused of a long series of other securities frauds and tax offenses. Additionally, Yamada admitted to continually perjuring himself during four days of testimony before the SEC. Pursuant to a plea bargaining arrangement entered into with the United States Attorney's Office, however, Yamada was allowed to plead guilty to only three counts of the same indictment which named petitioner and his cooperation disclosed to the sentencing judge in exchange for his testimony against petitioner and two other defendants.

Despite his past performance, the Government presented Yamada to the jury as a man who had elected to reform himself, and whose testimony was now worthy of belief.

The prosecuting attorney acknowledged the circumstances attending Yamada's testimony, but vouch-safed his credibility:

> "I am telling you this because you will hear a tremendous amount of wind and air coming out of defense counsel . . . in an effort to prove Galanis and Yamada are lying to you on the stand about their activities in this case, they will tell you that a deal was made and that they were given preferential treatment by the United States Attorney's Office and by the SEC and by the Internal Revenue. . . .
>
> "And they [Galanis and Yamada] will testify frankly that they made this agreement with full recognition that if they did not reach the agreement they could be charged in 20 or more serious securities violations. I want to get that out in the open, and I think as the trial wears on you will find that these things will come out in the open because it is this context in which this case was brought, that Galanis and Yamada stepped forward and said 'I did these things, and I want to pay for these things, but I don't want to spend the rest of my life in jail, I am 29 years old, I will make an agreement with you. I will tell you everything I know if you will reduce the amount of charges, potential charges, against me." R, 57-58*

Again, on direct examination, the Government elicited the statement from Yamada that "I agreed to tell the absolute truth. . . . I was going to start anew, and start a new life." R, 1577. In summation, the prosecuting attorney claimed that the cooperating witnesses has said "Enough, I want to tell the truth," and that in particular, Yamada "was honest" and his testimony bore "the hallmarks of credibility." R, 4015.

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* R refers to the trial transcript.

Although Yamada's testimony was pervaded by what Judge Mansfield termed "more than a trace of self-interest" 495 F.2d at 688, it was essential to the Government's case against petitioner. Petitioner's involvement in this "Byzantine" conspiracy was introduced through the testimony of Yamada, 495 F.2d at 686, and was based on an extraordinarily complicated series of meetings and conversations, the existence of which petitioner has steadfastly denied. The Government's own bill of particulars stated that petitioner was unaware of the heart of the conspiracy with which he was charged, and yet, despite the tenuousness of petitioner's connection with the "serpentine" course of the averred conspiracy, 495 F.2d at 688, the testimony most directly incriminating him in the "tangled web of falsity" was Yamada's. 495 F.2d at 687.

The affirmance of the Court of Appeals also rested upon the wholesale adoption of Yamada's version of events. For example, the Second Circuit's second footnote, 495 F.2d at 687, contains a categorical statement as to petitioner's motive for participating in the scheme. However, this interpretation of petitioner's reasons for engaging in the transaction described rests solely upon the word of Yamada; no other witness attributed evil motives to him in connection with the act which was essential to the Government's establishing the element of wilfulness on petitioner's part. In fact, that testimony was totally inconsistent with the Government's bill of particulars which stipulated that petitioner had received no unlawful compensation. Thus, it is abundantly clear that the jury's verdict as well as the affirmance by the Second Circuit was due to a conscious decision to accept the testimony of Yamada rather than the explanation offered by petitioner.

Almost immediately subsequent to the conclusion of the trial and during the pendency of the original appeal, a

series of events transpired which shattered the reliability of the Yamada testimony. As previously noted, Yamada had entered into a plea bargaining arrangement whereby, in exchange for his testimony against petitioner and others, he would be permitted to plead guilty to a lesser number of crimes and his cooperation disclosed to the sentencing judge. Yamada appeared before Judge Cooper for this purpose within two weeks of the termination of petitioner's trial. Stating that Yamada, unlike other defendants who had previously come before him, was unredeemed by proof of valuable community or charitable work, Judge Cooper sentenced him to a two-year term of imprisonment.

Thereafter, within a short period of time, Yamada moved for a reduction of sentence on the grounds that he was thoroughly reformed and, in fact, currently engaged in valuable social activities, namely, the rehabilitation of drug addicts. As evidence of his new found altruism and conscience, five letters were submitted to the sentencing judge, from a doctor, social workers, an employer and an addict, all heartily endorsing Yamada's plea for leniency.

On January 31, 1974, Yamada was indicted (Index No. 74 Cr. 100) on five counts of attempting to defraud the United States in violation of 18 U.S.C. §§ 1341 and 2; on five counts of conspiracy to defraud the United States in violation of 18 U.S.C. §§ 1341 and 2; and on five counts of false writing in violation of 18 U.S.C. §§ 1001 and 2. The Government in the indictment stated that the letters which Yamada had submitted to Judge Cooper in support of his plea for leniency were all "false, forged and fictitious." The entire, intricate scheme which Yamada had attempted to perpetrate in the Court was simply a tissue of lies and deceits. He had never engaged in any drug rehabilitation work whatsoever, and he was either unknown to the individuals whose letters of commendation on his behalf he

forged or else such persons were invented out of thin air and their letters fantasized by the author. It was later learned that Yamada had suborned several of his employees into transcribing his letters into their own handwriting so as to enhance the letters' authenticity.

On April 15, 1974, Yamada pleaded guilty to six (6) of the sixteen (16) counts in the indictment, and appearing before Judge Lasker for sentencing on this latest offense "explained his conduct" as follows:

> "Prior to my incarceration my feelings about going to prison were no different than I suppose the standard version that one gets about prison from various periodicals, movies, or what-have-you and I was scared, I was irrational of every conceivable fear concerning prison. . . ."

Of all the statements made by Yamada, the above recitation of "irrational . . . fear" is the only one which can be taken at face value because it is the only factor which remains constant throughout Yamada's twisting and turning. From his indictment through to his re-sentencing by Judge Lasker, Yamada was possessed by the single, overmastering desire to escape prison; and this drive led him to tailor his testimony so as to appear most useful to a successful prosecution of the petitioner.

By the Government's own admission, Yamada's subsequent fraud "substantially vitiated" his usefulness as a witness, and their sentencing memorandum to Judge Lasker, set forth in the appendix herein, states:

> "We stress at the outset that, upon this sentence, Yamada is entitled to no consideration whatsoever for any *previous* or future cooperation with the Government." (emphasis added.) (App. 19a)

This statement alone under this Court's holding in *Mesarosh* v. *United States*, 352 U.S. 1 (1956), more fully discussed *infra*, would be sufficient to require that petitioner herein be accorded a new trial. However, it is submitted that Yamada's fraudulent letter scheme goes further than destroying his general reliability as a Government witness, but also impeaches the factual substance and particulars of his testimony as well. This conclusion follows for the foregoing reasons.

First, the Government's sentencing memorandum firmly establishes Yamada's predisposition to seize upon suggestions made to him by Government officials, and from that starting point, to fabricate facts and events which would serve to substantiate them. This disturbing tendency is underscored by the Government's statement that Yamada concocted his fraudulent letter scheme at his first sentencing when Judge Cooper contracted his situation with that of another defendant who had received leniency due to his involvement in social work. The extent of Yamada's neurotic suggestibility is indicated by the fact that his forged correspondence attempted to parrot the very language of the prosecutor at his original sentencing. Thus, the Government's memorandum notes:

> "The letters betray a deliberate effort to fabricate information which Yamada knew would commend themselves to Judge Cooper's attention. The first letter, for example purportedly written by the physician-director of the clinic, states, 'I find it inconceivable that a man who had devoted a tremendous amount of time over the past two years to interview our patients and help secure employment for many should be sentenced for violations which were committed before entering a new field of business and social outlook.' Such language appears almost as a direct response to

> an observation of the prosecutor at the time of sentence: '. . . having recently reread your Honor's opinion in the Benjamin Haggett motion for reduction of sentence I know that your Honor is of the very strong opinion that it is as much the conduct of the defendant after the crimes have been committed as it is his conduct before which must be taken into account by a sentencing judge' ". (App. 15a-16a)

Yamada was thus conditioned to seize upon random, extemporaneous remarks made by Government officials and parlay them into complex schemes favorable to himself. The trait manifested itself in Yamada's letter scheme; it surfaced even more dramatically in his testimony at petitioner's trial, which was preceded by numerous meetings with the S.E.C. staff and U.S. Attorney's office at which his elaborate falsehoods first germinated, and under the prosecution's promptings, flourished into the same kind of refined and intricate fantasy as his fraudulent letter scheme.

A second connection between his letter scheme and his testimony at petitioner's trial consists of Yamada's demonstrated predilection for drawing innocent individuals into his own web of criminal activities. As set forth by the Government in its memorandum, Yamada did not hesitate to suborn his own secretary, his chauffeur and his chauffeur's wife into forging the letters, nod did he feel any reservations about unjustly maligning a physician and a probation officer in the fictitious correspondence. (See App. 17a, 23a)

A further bridge between Yamada's testimony at petitioner's trial and his subsequent perjury is the haste with which he proceeded from the former to the latter. The Government has maintained that it was only after his

original sentencing that Yamada reverted to his sinful ways. Such a position is untenable in light of the Government's own admission that Yamada broke his plea bargaining arrangement "almost as soon as it was made." (App. 20a) In light of the speed and wholesale manner in which the pact was violated, it cannot be realistically contended that Yamada was the victim of a "Jekyll and Hyde" syndrome whereby he was truthful or untruthful as the situation demanded. On the contrary, his perjury existed from his indictment to his resentencing, because, as the Government states, he

> ". . . fully expected to manipulate the court, just as he had previously manipulated the victims of his financial frauds . . . [and Yamada] has demonstrated a cynical disregard for the administration of justice and an attitude that this Court is as vulnerable to deception as any victim of a securities fraud." (App. 24a)

Finally, the bearing of Yamada's fraudulent letter scheme upon his testimony at trial is seen in their striking psychological similarity. Both are characterized by an ability to construct intricate and detailed relationships; both instances display a brilliance at manufacturing events and sophisticated transactions. The resemblance is so uncanny that the very substance and particulars of Yamada's testimony at trial must be cast into grave doubt.

In sum, it violates the dictates of common sense to hold that the "tangled web of falsity" which Yamada wove at petitioner's trial is any more credible than the whole tissue of lies relating to his "drug rehabilitation work." Rather, the brazenness of Yamada' deception and the extent of his deceit reveal a continuing pattern of conduct which requires that a new trial be granted petitioner.

On the basis of the above facts, petitioner made a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure before the trial judge. The motion was denied. On appeal, the District Court's denial was affirmed in a written opinion, not yet officially reported, a copy of which is reprinted in the appendix.

Reasons for Granting the Writ

1. In failing to apply this Court's holding in *Mesarosh* v. *United States* to a situation where it is fully applicable, the Second Circuit called into question the continuing validity of that case, and has created a conflict between itself and the Ninth Circuit which requires review by this Court.

The immediate controversy is governed by *Mesarosh* v. *United States*, 352 U.S. 1 (1956), and in view of the principles set forth in that case, it must be concluded that the lower courts erred in not granting petitioner a new trial.

In *Mesarosh*, petitioners were convicted of conspiracy to violate the Smith Act, largely upon the testimony of seven Government witnesses, including an undercover agent who specialized in anti-communist affairs named Joseph D. Mazzei. Subsequent to Mazzei's appearance at petitioners' trial, he was called as a Government witness in a series of other, unrelated prosecutions of alleged subversives. As these proceedings progressed, Mazzei's testimony became increasingly bizarre and farfetched. For example, in one case he stated that a communist executioner had been dispatched to liquidate Senator Joseph R. McCarthy; in another, Mazzei asserted that the FBI had coerced him into falsely pleading guilty to charges of "adultery and bastardy" in a Pennsylvania State Court.

As his testimony grew more and more preposterous, the Government became concerned about the possibility that

Mazzei's later statements might cast doubt over the credibility of his testimony at past trials, including Mesarosh's. Therefore, approximately four years after Mesarosh's conviction, and while the *Mesarosh* case was on appeal to the Supreme Court, the Solicitor General filed motion papers with this Court in which he stated that although several of Mazzei's recent statements were either known or believed by the Department of Justice to be false, he asserted that Mazzei's testimony at petitioners' trial "was entirely truthful and credible." Conceding that a genuine issue with regard to veracity of Mazzei's testimony against Mesarosh might exist, however, the Solicitor General suggested that the question be resolved pursuant to a hearing before the district court judge.

While lauding the Government's commendable candor, this Court* held that a new trial was the only correct remedy:

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial.
>
> "The district judge is not the proper agency to determine that there was sufficient evidence at the trial, other than that given by Mazzei, to sustain a conviction of any of the petitioners. Only the jury can determine what it would do on a different body of evidence. . . ." 352 U.S. at 9, 12.

Chief Justice Warren went on to conclude:

> "Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed

* Five justices were for a new trial while three justices believed that there should be a remand for an evidentiary hearing on the issue of Mazzei's credibility.

> without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity. . . .
>
> "The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial." 352 U.S. at 14.

The facts of the instant case are, if anything, even more compelling than those in *Mesarosh*. Here, Yamada's fraud, motivated as was his cooperation with the U. S. Attorney by a desperate desire for leniency, grew out of the same operative set of circumstances as his testimony at petitioner's trial. Mazzei's alleged untruths, on the other hand, were all uttered in wholly unrelated matters, and for reasons which the Solicitor General could not establish, except to speculate that his behavior resulted from "a psychiatric condition." Mazzei was one of seven witnesses against Mesarosh, and his subsequent, credibility-shattering statements were uttered years after the Mesarosh trial; in the immediate case, however, Yamada was one of two essential witnesses against petitioner, and his perjury was committed within weeks of his testimony at trial.

Furthermore, in *Mesarosh*, Mazzei's credibility only came into question by way of a letter from the Solicitor General conceding that a reasonable man might believe that a genuine issue existed as to the truthfulness of the witness's past testimony. The Solicitor General steadfastly main-

tained, however, that Mazzei's statements in the Mesarosh proceeding were accurate. The case at hand involves a far graver confession of error on the part of the Government: here the prosecution has *indicted, convicted* and *sentenced* its main witness for numerous subsequent perjuries which have been established beyond the peradventure of a doubt.

It would therefore seem that petitioner is entitled to a new trial, under the *Mesarosh* holding, but such has not been the case. The District Court in denying petitioner's motion for a new trial rested its decision on the belief that the newly discovered evidence was merely "cumulative on impeaching his credibility," (App. 9a) and consequently, not a sufficient basis for the granting of a new trial. In attempting to distinguish *Mesarosh,* the trial judge cited the portion of the opinion which reads:

> "Such an allegation by the defense ordinarily will not support a motion for a new trial, because new evidence which is 'merely cumulative or impeaching' is not, according to the often repeated statement of the Courts, an adequate basis for the grant of a new trial." 353 U.S. at 9.

The District Court was in error on both grounds. As to the first, the connective tissue between Yamada's letter scheme and his testimony at trial is fully set forth in the statement of facts *supra.* Despite this wealth of evidence relating to the witness's perjury committed subsequent to his testimony at petitioner's trial, the trial judge was simply unwilling to acknowledge that what was brought to his attention was not simply an additional series of falsehoods occurring *prior* to Yamada's "cooperation" with the Government, as in the usual case, but rather proof that Yamada's deceit permeated his entire involvement with the proceedings from start to finish.

Moreover, the decision is lamentably facile in its attempt to distinguish *Mesarosh*. It should be noted that *Mesarosh* does not require the Government witness to commit subsequent acts which call into question his factual testimony at previous trials; all that is necessary is that he commit acts which cause the Government to take steps against him which cast doubt upon his general credibility as a witness at petitioner's trial. Failing to confront the issue, the trial court notes that a *Mesarosh* situation has not arisen because it is the *defense,* rather that the Government, which has brought the new evidence to the Court's attention, and thus, the case is an "ordinary" one not worthy of special consideration.

That position is untenable. *United States* v. *Chisum,* 436 F.2d 645 (9th Cir. 1971), makes into law what is evident to common sense: that is, for purposes of a motion for a new trial based on *Mesarosh,* a *criminal indictment* will be considered equivalent to the Solicitor General's admitted doubts about the reliability of a Government witness.

In *Chisum,* defendant was convicted of various narcotics offenses, principally upon the testimony of one Saiz, a Government informer. Two years later, Chisum filed a motion to vacate the judgment and grant him a new trial in support of which he presented the court with a copy of a multicount indictment, which had recently been brought against Saiz. The Court on its own initiative ascertained that Saiz had pleaded guilty to a single count, that of giving false testimony at a trial unrelated to Chisum's, and was subsequently sentenced to a year's imprisonment. This newly discovered evidence had no bearing on factual issue in Chisum's trial, except insofar as it indicated that the Government agents who were responsible for Chisum's conviction had an apparent tendency towards perjury and suborning witnesses, and that they had likely indulged

those tendencies during a trial contemporaneous with the dates on which Chisum was alleged to have committed the crimes for which he was later convicted.

The Court, citing extensively from *Mesarosh*, reversed the District Court's denial of defendant's motion for a new trial, stating:

> "This case differs from *Mesarosh* in one respect. There, as the Chief Justice emphasized, it was the government which brought Mazzei's perjury to the Court's attention. In our case, it is the defendant who has done so. But what is before us is not the usual case in which a defendant asserts that a witness has perjured himself. Here, it is the government itself that brought the charge against Saiz and Downing. . . .
>
> "We hold that Chisum's conviction is as much tainted as was the conviction in *Mesarosh*." 436 F.2d at 649.

It therefore appears that the District Court's attempt to distinguish *Mesarosh* is erroneous, or else, so at odds with the reasoning of the Ninth Circuit as to warrant review by this Court.

In affirming the District Court's denial of the motion for a new trial, the Second Circuit analyzed that issue simply as an ordinary Rule 33 motion. It stated that it felt obliged to follow the determination of the trial judge that the "newly discovered evidence" was "cumulative on the issue of credibility," and that the lower court had not abused its discretion in so finding. Realizing that that determination might not dispose of the appeal because *Mesarosh* considerations were present, the Second Circuit stated:

> "*Mesarosh* v. *United States*, 352 U.S. 1 (1956), gives no support to the contentions of appellants here. It

did not involve a defense motion for a new trial but rather a *sui generis* exercise by the Supreme Court of its supervisory jurisdiction at the instance of representation submitted by the Solicitor General." (App. 5a)

To the extent that the Second Circuit is attempting to distinguish *Mesarosh* on the grounds that there, it was the Government which instigated the motion, the Court's decision runs afoul of *Chisum, supra.* If the Second Circuit is pleading that it lacks the "supervisory jurisdiction" to apply the *Mesarosh* principles, it is likewise incorrect, since it is obvious that the circuit courts of appeal possess such discretionary powers over the administration of justice in the district courts. See *Chisum* v. *United States, supra; United States* v. *Basurto,* 497 F.2d 781 (9th Cir. 1974); *Bursey* v. *United States,* 466 F.2d 1059 (9th Cir. 1972); *United States* v. *Poole,* 379 F.2d 645 (7th Cir, 1967). Thus, although the opinion of the Second Circuit was unanimous, it was couched in language which invites review by this Court.

It is submitted that the Second Circuit's resistance to *Mesarosh* stems from a fear that to give its rationale full vent would result in the further burdening of an already overburdened district court calendar. However, whether solicitude for the voluminous case load of the Southern District of New York is sufficient grounds for abandoning the *Mesarosh* principles is a decision which only this Court, not the lower courts, can make. If, upon inquiry, the Court feels that *Mesarosh* is an historical curiosity or a procedural luxury which our system of justice can longer afford, it should so state, and explicitly overrule the decision. If it is to have continued vitality, however, this Court must direct the lower federal tribunals to apply its full force where, as here, the occasion demands it.

In making the determination, this Court should be aware that contrary to the fears expressed by the Second Circuit, *Mesarosh* is a narrow decision; it comes into play only when a major Government witness commits subsequent crimes which cut directly to the heart of his credibility at a defendant's trial. Thus, the witness' subsequent violent crimes or demonstrated instances of moral turpitude which do not affect the veracity of his testimony are not sufficient to invoke *Mesarosh.*

Indeed, statistics indicate the remoteness of the possibility of the recurrence of *Mesarosh*—activating fact patterns. In the eighteen years elapsed since the Supreme Court announced the decision, less than ten reported federal cases have cited *Mesarosh* as providing grounds for a new trial. And of those cases, in only one, *Chisum* v. *United States,* has the Court granted the motion for a new trial.* Contrary to the statement by the Second Circuit that petitioner "would have us develop some new law because of what they call the special circumstances of this case," petitioner seeks nothing more than this Court's affirmation of the continuing validity of *Mesarosh.*

Thus, a review of *Mesarosh* would provide this Court with an opportunity to (1) clarify the relationship between that case and traditional motions for new trials pursuant to Rule 33 of the Federal Rules of Criminal Procedure, (2) define the scope of appellate review in applying *Mesarosh* to appropriate situations, and (3) most importantly, to reconsider the principles set forth in that case in light of realities of contemporary criminal practice, and to thus determine if *Mesarosh* should be considered as anything more than a dead letter.

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* See also *United States* v. *Gordon,* 246 F. Supp. 522 (D.D.C. 1965), *aff'd,* 383 F.2d 936 (D.C. Cir. 1967), where defendant was awarded a new trial on traditional Rule 33 grounds although the circumstances of that case are analogous to the immediate one and seemingly involve *Mesarosh* considerations.

2. The decision of the Second Circuit misstates the relevant standard for the granting of a new trial under Rule 33.

In cases involving the possibility of perjury at trial by a key government witness, the relevant Rule 33 standard for determining the materiality of such newly discovered evidence is whether it *"might"* result in a different verdict in the event of a retrial. *United States* v. *Miller,* 411 F.2d 825, 830 (2d Cir. 1969); *United States* v. *Hiss,* 107 F. Supp. 128 (S.D.N.Y. 1952), *aff'd* 201 F.2d 372 (2d Cir. 1053), *cert. den.* 345 U.S. 942 (1953); *Larrison* v. *United States,* 24 F.2d 82 (7th Cir. 1928). See also *United States* v. *Johnson,* 327 U.S. 106, 111 n. 5 (1946). The Second Circuit invoked a far harsher standard, and thus ignored its own decisions regarding the requirements for the grant of a new trial under Rule 33.

The Second Circuit agreed with the trial judge's finding that there was

> ". . . no probability that on a new trial with the benefit of the evidence concerning the fraudulent letters a new jury would reach a different conclusion. . . ."

The Second Circuit further stated:

> "We are not persuaded that a new jury would decide the case differently if it knew that Yamada's claim at the first trial that he had reformed and turned over a new leaf was false."

The Second Circuit thus relied on a test which is tantamount to saying that a court must be *certain* that a jury would reach a different result. As cited above, the correct standard is whether that jury *might* reach a different verdict.

CONCLUSION

For all of the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 3, 1975

APPENDIX

Opinion By the United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 110, 114—September Term, 1974.

(Argued October 1, 1974 Decided November 4, 1974.)

Docket Nos. 74-1678, 74-1839

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

PHILIP ZANE, JEROME E. SILVERMAN, and ROBERT S. PERSKY,

Defendants-Appellants.

Before:

MEDINA, ANDERSON and MANSFIELD,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge.*

Philip Zane, Jerome E. Silverman and Robert S. Persky appeal from an order denying a motion for a new trial on the ground of newly discovered evidence.

Affirmed.

Appendix

JAMES E. NESLAND, Assistant United States Attorney, New York, N.Y., (Paul J. Curran, United States Attorney for the Southern District of New York, and John D. Gordan III, Assistant United States Attorney, New York, N.Y., on the brief), *for Plaintiff-Appellee.*

SANDOR FRANKEL, New York, N.Y., (Louis Bender, New York, N.Y., on the brief), *for Defendants-Appellants Philip Zane and Jerome E. Silverman.*

JOHN LOGAN O'DONNELL, New York, N.Y., (Charles M. McCaghey, Stephen Schlessinger and Olwine, Connelly, Chase, O'Donnell & Weyher, New York, N.Y., on the brief), *for Defendant-Appellant Robert S. Persky.*

MEDINA, *Circuit Judge:*

On June 13, 1973 Philip Zane, Jerome E. Silverman and Robert S. Persky, two accountants and a lawyer, were convicted after a five-week trial to Judge Wyatt and a jury on one count of a multi-count indictment for filing a false Form 10K Annual Report for Microthermal Applications, Inc. with the SEC. We affirmed 495 F.2d 683, *cert. denied,* 43 U.S.L. Week 3239 (U.S. October 22, 1974). One of the defendants, Akiyoshi Yamada, pleaded guilty to a one-count indictment charging conspiracy to file the false report and he co-operated with the government. He gave extensive testimony implicating Zane, Silverman and Persky not only on the charge of which they were found

guilty but on various other counts on which they were acquitted. Less than four weeks after the conviction of Zane, Silverman and Persky, Yamada came before Judge Cooper on a motion to reduce the sentence imposed on him for the crime to which he had pleaded guilty. In support of this motion five letters purportedly written by persons active in community affairs were submitted by Yamada to Judge Cooper. These letters, which testified to Yamada's good character and praised his work with drug addicts, were written by Yamada himself to influence Judge Cooper. Claiming that proof that Yamada had forged these letters and that he had engaged in such fraudulent and criminal conduct constituted newly discovered evidence, Zane, Silverman and Persky made a motion for a new trial, pursuant to Rule 33, Fed. R. Crim. P. Judge Wyatt denied the motion from the bench remarking that Yamada's credibility had been fully explored at the trial, that the sending of the letters was merely cumulative evidence by way of impeachment and that such proof had no relevance to the issue of the filing of the false report with the SEC. He also found there was no probability that on a new trial with the benefit of the evidence concerning the fraudulent letters a new jury would reach a different conclusion with respect to the guilt of these appellants. This appeal is from the order of Judge Wyatt denying the motion for a new trial.

It requires no more than a brief recital of the law in this Circuit governing the function of the trial judge and that of this Court in connection with Rule 33 motions for a new trial on alleged newly discovered evidence to dispose of this appeal. In the exercise of his discretion the trial judge must determine whether there is a showing: (1) that the evidence could not with due diligence have been

discovered until after the trial; (2) that the evidence is material to the factual issues at the trial and not merely cumulative and impeaching; and (3) that the evidence would probably produce a different result in the event of a new trial. *United States* v. *Birrell*, 482 F.2d 890, 892 (2d Cir. 1973); *United States* v. *DeSapio*, 456 F.2d 644, 647 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972); *United States* v. *Polisi*, 416 F.2d 573, 576-77 (2d Cir. 1969). Less exacting standards, not relevant here, are required in cases involving prosecutorial misconduct or negligence. See, *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). The function of the Court of Appeals is to decide whether the trial judge has applied these criteria and whether his finding that the application of these criteria required a denial of the motion is or is not clearly erroneous. It is not our function to speculate on the possibility that a jury on a new trial might acquit the defendants. As we conclude that Judge Wyatt applied the proper criteria and that there is no tenable basis for holding that Judge Wyatt abused his discretion, or that his finding in applying the criteria was clearly erroneous, we affirm the order appealed from. It is especially important that this separate consideration of the respective functions of the trial judge and of an appellate court be made in Rule 33 cases involving long complicated trials.

It is obvious that the evidence of the forgery and sending of the letters was cumulative on the issue of credibility and that it had no bearing on the issue of whether or not appellants were guilty of filing the false report with the SEC. Yamada had a lengthy history of involvement in fraudulent securities schemes. Prior to the trial of the appellants, Yamada pleaded guilty to three one-count indictments, one of which concerned the conspiracy to file a false

annual report for Microthermal. In return for co-operation with the government in the prosecution of the appellants, it was understood that the government would not proceed on other criminal offenses committed by Yamada, and also that the government would advise the court of his co-operation at the time of sentencing. At the trial, Yamada was subjected to thorough cross-examination. The basis of Yamada's co-operation, the criminal charges, and his numerous fraudulent securities schemes were brought out to impeach his credibility. In addition, Yamada testified to destroying documents and giving perjurious testimony before the SEC in the course of its investigation into Microthermal.

In support of his finding that the evidence of the forged letters would probably not result in any different decision by the jury on a new trial, Judge Wyatt referred to his recollection of the proofs and his instructions to the jury. We find no reason to disturb a finding based upon such reasoning. We are not persuaded that a new jury would decide the case differently if it knew that Yamada's claim at the first trial that he had reformed and turned over a new leaf was false. Indeed, at the time of the first trial he may have thought he had reformed.

Nevertheless, as we understand their arguments, appellants would have us develop some new law because of what they call the special circumstances of this case. Again and again appellants would have us reverse the decision below because Yamada's testimony at the trial and his forgery of the letters were supposed to be part and parcel of a deep-seated determination to resort to any means to keep out of jail. This is indeed novel doctrine and it would result in new trials whenever after a criminal trial the conduct of a defendant-turned-government-witness indicated a desire to escape the toils of

justice by any form of lying or skulduggery that could be made to appear similar to the alleged giving of false testimony at the trial in the hope of obtaining consideration for his co-operation with the prosecution.

Mesarosh v. *United States*, 352 U.S. 1 (1956), gives no support to the contentions of appellants here. It did not involve a defense motion for a new trial but rather a *sui generis* exercise by the Supreme Court of its supervisory jurisdiction at the instance of representation submitted by the Solicitor General.

The appellants place great emphasis on the fact that the forged and fictitious letters were submitted shortly after the conclusion of the trial resulting in the conviction of the appellants. This fact, however, does not alter the cumulative and impeaching character of these disclosures, nor does it provide an appropriate basis to distinguish this situation from other cases involving Rule 33 motions.

Affirmed.

Oral Opinion of Judge Wyatt

. . . he had not yet been a man reformed, but none of that spoke to his credibility subsequent to making his deal with the SEC, and I only mention that to your Honor as an illustration of why, in my opinion, this is not cumulative impeaching evidence.

The Court: It seems as if we are back to almost a year ago because I can remember Mr. Frankel and Mr. O'Donnell making arguments which were terribly persuasive in making one to decide in accordance with their arguments, but it frequently turned out that I didn't feel able to do so.

I have given this a good deal of consideration and I have read all the papers even the pleadings, and including

the papers submitted this afternoon. However, I do not think I can grant this motion.

There are two motions, but they raise the same point, and that is that the admitted fraud of Yamata on Judge Cooper after his testimony at the trial in our case requires a new trial. But, as I have said a moment ago, the situation here is that Yamata, of course, was not the only witness for the government.

As I have ample cause to remember—but I have not reread the transcript—his credibility was attacked and severely attacked and ably attacked, as was perfectly proper, and he was shown to be an accomplice, an admitted perjurer, and guilty of criminal offenses, and counsel for the defendants are right in saying that as of the time of trial he was saying in substance that he had reformed, and was then telling the truth, where shortly thereafter, he was back committing, in substance, perjury. I understand. Your Points are well made.

But I still believe that since his credibility, as the Court of Appeals said, was thoroughly explored: the jury had before it the various felony charges that had been made against Yamata, the pleas of guilty, his perjury before the SEC, his hopes of leniency, and they were dealt with not only in his testimony but in summation, and I remember in my charge I gave—I have to say "standard" instructions, but I do have a usual formulation as to accomplice testimony and to testimony of those with prior criminal convictions, and I did call to the attention of the jury the fact that Yamata was an accomplice, that he had criminal records.

I know that I said also that he was an admitted perjurer; I think I may have done that at the request of one or more of the defendants. I told the jury that the testimony of

accomplices and of those with criminal convictions and of those who admitted perjury should be viewed with great caution and scrutinized carefully, so I certainly impressed it on the jury what they had to do in weighing Yamata's testimony.

Therefore, it seems to me despite able representations this afternoon, what he did before Judge Cooper, which seems not only fraudulent but foolish, but still, whatever it is, it seems to me to be cumulative on impeaching his credibility.

As I indicated, I have studied Mesarosh and certainly counsel for the defendants should have brought it to my attention. I do not think I knew the case before.

However, accepting the opinion of the Court, as I must, despite the three dissents, I must conclude that this is one of those instances to which the Court refers at 352 U.S. 9 where untruthful statements by a government witness subsequent to the trial are offered in support of a motion for a new trial as newly discovered evidence affecting his credibility at trial, and then, as I am sure you gentlemen have already read, the Court says, "such an allegation by the defense ordinarily will not support a motion for a new trial because new evidence which is merely cumulative for impeaching is not, according to the often repeated statement of the Courts, an adequate basis for the grant of a new trial."

Therefore, I feel obliged to deny these motions, and since my statement of my reasons have been made a part of the stenographic transcript, I will simply, in due course, endorse the motion papers: motion denied for reasons stated in open Court.

Thank you very much, gentlemen, for coming.

Appendix

Government Sentencing Memorandum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Cr. 100

UNITED STATES OF AMERICA

—v.—

AKIYOSHI YAMADA,

Defendant.

The Government respectfully submits this memorandum to set forth the facts which would have been established at the trial of the defendant Akiyoshi Yamada and to bring to the attention of the Court certain information which we believe to bear upon the sentence to be imposed by the Court. Yamada has entered a plea of guilty to the conspiracy count and five substantive counts of the indictment charging him with knowingly submitting false and fraudulent letters to the Court in violation of Title 18, United States Code, Section 1001. It is our position that these crimes are matters of the utmost gravity which, in the factual context of this case require a stern response by the Court.

1. *Facts.*

In May of 1973, Akiyoshi Yamada entered guilty pleas to conspiracy charges in each of three separate fraud cases then pending against him in this District. The pleas were

entered under an agreement by which Yamada would make himself available to the Government as a witness concerning all matters in which he had in any way participated that he would cooperate completely with the Government in all such cases, would testify truthfully as necessary at any trial, grand jury, S.E.C. or other proceeding, and that he would refrain from any further criminal activity. In exchange for this promise of cooperation, the Government agreed not to proceed against Yamada in any other pending case or investigation involving him. The precise details of Yamada's possible criminal exposure are set forth in Appendix A hereto, a letter to the United States Attorney's Office from the S.E.C. attorney in charge of Yamada-related cases.

On June 26, 1973, Yamada appeared for sentence before the Honorable Irving Ben Cooper, who imposed a sentence of two years' imprisonment and a consecutive five-year term of probation on the three separate convictions and directed Yamada to surrender on or before August 1, 1973. We attach as Appendix B hereto the minutes of the Court's imposition of sentence.

The minutes of such sentence reveal the motive which prompted the commission of the crimes presently before the Court. In sentencing Yamada, Judge Cooper commented on the absence of any apparent charitable concern or activity in Yamada's record. He stated:

> "Yesterday I sentenced two human beings, brothers. No prior record, one a school teacher. They both collapsed when in connection with a financial enterprise they had launched, it began to get into difficulty, and in order to extricate themselves they conceived of some half baked notion which they thought would help them

out of their difficulties. What they did was an isolated instance or two.

As a fact finder—and I am pretty good at that—I had to declare that contrition had set in. It was deep; it was of a quality that was convincing to this Judge. They had shaken themselves up so badly that the torture which was inflicted over what had happened to them was the greatest punishment that could have possibly taken place. I am not prepared to say, by any means, that that is true here.

But there are assets that a Judge must consider. You pled guilty. Oh, I have been around long enough to know that in the long run you undoubtedly would have been found guilty. This is a resourceful governmental agency. But you did plead guilty. You have no prior record. *But there are not testimonials such as was present yesterday of moral deportment over a period of time that came to stand beside those who had to face sentence yesterday. You haven't got them. They are not here. I can't look to a Yamada who did things of quality, who lent aid to those who were suffering; who dedicated a period of his time to uplift the neglected, the tormented. Absent.* Everywhere I turn you are flayed. Every document I pick up denounces you. These valuable assets that come to a man in his hour of need are not here. They are moral, ethical values, that have a great deal to do with a Judge's concern as to what has happened to the human being sentenced." (T. 17-19) (Emphasis added.)

Immediately after the imposition of sentence, Yamada commenced the fraud which is the subject of the instant charge. Having never "lent aid to those who were suffer-

ing," he decided to concoct evidence of such charity in order to persuade Judge Cooper to reduce the two-year sentence imposed on June 25, 1973.*

In early July, 1973 he caused his attorney to file a Rule 35 motion before Judge Cooper.** Shortly thereafter, he commenced to manufacture letters purporting to detail a longstanding involvement in rehabilitating narcotics addicts. Through his secretary, Alida Bernstein, Yamada located one Paul Rogers, who was then employed in a Manhattan methadone clinic. Through Miss Bernstein, Yamada paid Rogers a sum of money (approximately $300) to fabricate two letters on stationery of the clinic describing Yamada's fictitious efforts to assist addicts to find employment, to stay away from narcotics, and so forth. The Government is in possession of the stenographic notes dictated by Yamada to Miss Bernstein which formed the basis for the letters, each of which is set forth in the indictment and reproduced herewith as Appendix C. We need hardly add that Yamada had never involved himself in any such charitable activity, nor had he ever met either of the purported signers of the two letters.

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* Only a technicality prevented this case from being prosecuted as a violation of Yamada's probation. At the conclusion of the June 26, 1973 minutes of sentence, the Court explicitly stated that the five-year term of probation imposed on Yamada with respect to one of the three conspiracy convictions was to run consecutively to the term of imprisonment. Thus, the crimes charged in the instant indictment, which were committed before Yamada's surrender, fell before the commencement of the probationary term. (T. 32)

** There is no evidence whatsoever that Yamada's counsel knew of his fraudulent scheme. To the contrary, the affidavits in support of the Rule 35 motion show that defense counsel was totally unaware of the fraudulent letters to Judge Cooper and of Yamada's false claim that he had long been involved in rehabilitating narcotics addicts.

The letters betray a deliberate effort to fabricate information which Yamada knew would commend themselves to Judge Cooper's attention. The first letter, for example, purportedly written by the physician-director of the clinic, states, "I find it inconceivable that a man who has devoted a tremendous amount of time over the past two years to interview our patients and help secure employment for many should be sentenced for violations which were committed before entering a new field of business and social outlook." Such language appears almost a direct response to an observation of the prosecutor at the time of sentence: ". . . having recently re-read your Honor's opinion in the Benjamin Haggett motion for reduction of sentence I know that your Honor is of the very strong opinion that it is as much the conduct of the defendant after the crimes have been committed as it is his conduct before which must be taken into account by a sentencing judge." (T. 7)

Yamada also composed the fictitious letter contained in Count Three. The purported "Flushing Center for Drug Counseling and Rehabilitation" did not exist, and Yamada caused fake stationery to be printed especially for the occasion, to lend an appearance of legitimacy to the letter. The address and telephone number appearing on such stationery are those of Yamada's then-chauffeur, a young, uneducated man named Gerald Williams. Williams has testified before the Grand Jury—and was prepared to testify at trial—that Yamada directed him to sign and send the letter as the "Community Director" of the non-existent drug agency.

With respect to the letter set forth in Count Four, Williams testified that Yamada had drafted the letter and given it to his chauffeur with instructions that he should have one of "his people" copy it in her own hand and that

he should forward the scrawled copy to Judge Cooper. Accordingly, Williams's wife, a woman of little education and of no real comprehension of what she was being asked to do, wrote the letter using Yamada's text, and Williams mailed it. The letter is designed quite clearly to convince Judge Cooper in the most dramatic terms that he had simply been unaware of Yamada's considerable charity toward the underprivileged.

The final letter set forth in the indictment was drafted jointly by Yamada and Edward Loughran, Jr., who, at that thime was a co-venturer with Yamada in an entertainment booking enterprise called Phoenix Entertainment Associates, Inc. Contrary to the implication contained in the letter—and to Yamada's representation to the Court at the time of his plea of guilty to this indictment—Phoenix was essentially a two-man operation run jointly by Yamada and Loughran and consisting of a secretary (Miss Bernstein) and a chauffeur (Mr. Williams). Attached to the letter was a bogus "copy" of a letter to Yamada's probation officer, a letter which was never received by the probation department. Both letters are included in Appendix C hereto. Both take pains to take the probation officer to task for failing to investigate Yamada's background. The Loughran letter, for example, states "Over the past few months I have made numerous telephone calls, was unable to reach [the probation officer] and never even got a message that he had returned a call. I find it strange that a probation officer would make no effort to contact a client's employer." The statement was a complete fabrication, designed to afford the Court a plausible explanation for a failure of the probation department to account for Yamada's newly-discovered charitable good works.

Appendix

In addition to the letters set forth in the indictment, the Government would have proven that Yamada solicited additional fake letters from Miss Bernstein and her finance which were shown to Yamada and then destroyed before being mailed. Finally, we would have offered Miss Bernstein's stenographic notes of a letter purportedly written by Loughran's father—who was at that time the Commissioner of Immigration of the Immigration and Naturalization Service—a letter which was dictated by Yamada but never sent.

2. *Yamada is entitled to no consideration whatsoever for any previous or future cooperation with the Government.*

We stress at the outset that, upon this sentence, Yamada is entitled to no consideration whatsoever for any previous or future cooperation with the Government. Such cooperation was the basis for limiting his substantial exposure to prosecution for other securities frauds and, as the sentencing minutes reveal, was taken into substantial consideration by Judge Cooper on June 26, 1973. Indeed, such cooperation was, in the eyes of the Court, virtually the only consideration which mitigated Yamada's record of almost unremitting fraud. (See Appendix B herein). Moreover, the very crimes which are the subject of the instant charges demonstrate that Yamada violated his agreement with the Government almost as soon as he had made it. Yamada was clearly advised that the commission of any further crimes would subject him to vigorous prosecution by the Government and would constitute a breach of the agreement. We are frank to advise the Court that we have considered prosecuting this defendant for his various unprosecuted frauds of which we have knowledge;

we have determined, however, that sufficient ambiguity exists as to whether Yamada understood that such consequences could flow from future criminal acts that we will not proceed on such cases. Nevertheless, it is clear that Yamada breached his agreement with the Government by committing the crimes presently before the Court. Moreover, the fraud perpetrated by Yamada has substantially vitiated his usefulness as a Government witness in any future prosecutions, thus rendering such cooperation far less significant than was anticipated by Judge Cooper at the time of the sentence imposed last year.* Finally, we submit that the fraud perpetrated by Yamada upon the Court represents the antithesis of cooperation or of genuine contrition for his past fraudulent activities.

3. *Yamada's fraudulent scheme was carefully contrived effort to obstruct justice.*

The fraud attempted by Yamada is characterized by his counsel as having ben motivated "out of pure fear" by a man "overcome by emotion." (Yamada's sentencing memorandum, p. 6). We respectfully submit that the fraud set forth above was anything but a frenzied, last-minute act of panic. It was a calculated, well-thought out plan to deceive the Court. As we have shown above, it was designed to appeal to those concerns uppermost in the

* Indeed, in the one trial where Yamada has testified as a Government witness, defendants have recently moved for a new trial on the sole basis that Yamada's testimony has been shown to be unreliable in light of the subsequently-committed crimes alleged in this indictment. While we do not believe that this claim has any merit—and while we have no evidence that Yamada perjured himself in that case,—the motion illustrates the sort of problems which we may readily anticipate in any future case in which Yamada testifies.

mind of Judge Cooper. Moreover, the letters are well-organized, contain every appearance of genuineness and, in short, were clearly carefully aimed at deceiving the Court.

Standing by itself, the fraud attempted in this case amounts quite clearly to a serious effort to obstruct justice by tampering with the Court's sacred obligation to impose sentence. Yamada's counsel appears to suggest the submission of the false letters amounted to the commission of little more than misdemeanor-type offenses (Sentencing Memorandum, p. 7). With respect, we urge that the offenses committed by this defendant strike at the very heart of the criminal justice system and must not be tolerated as mere misdemeanors. Every judge who wrestles with his conscience to impose a just sentence must rely almost exclusively upon information provided him by others. Such information is as essential to the sentencing process as testimony under oath is to any court proceeding. Abuse of this system, especially under the aggravated circumstances presented here, amounts to a serious obstruction of justice and should be punished as such.

4. *Yamada thoughtlessly drew innocent individuals into criminal activity.*

The extraordinary irony of the fraud set forth above is that this defendant, in asserting to Judge Cooper that he was reforming narcotics addicts, was actually drawing various individuals into the commission of serious crimes. Our interviews of Miss Bernstein, Mr. Williams and Mrs. Williams convince us that, although they knew that it was wrong to submit forgeries to the Court, they did so because Yamada had prevailed upon them to help him. Each of these individuals, to our knowledge, had no prior involve-

ment with the law, yet each could well have suffered totally unforeseen, serious consequences from such actions. Moreover, the physician whose name was forged to the first letter and the probation officer who was unjustly maligned in several of the letters were also victimized by the fraud. In short, Yamada rather thoughtlessly drew others into this matter at precisely the time when he was seeking to demonstrate to Judge Cooper that he possessed a special kind of thoughtfulness for others.

5. *In the context of Yamada's pose of contrition his fraud on the Court must be viewed as an act of extraordinary hypocrisy.*

In the context in which this case arises, the fraud committed by Yamada is especially serious. By pleading guilty and agreeing to testify as a Government witness to his manifold fraudulent activities, Yamada assumed a pose of contrition concerning such frauds which, it is now clear, was merely a device to reduce or, hopefully, eliminate imprisonment for such crimes.* In submitting the fraudulent letters to Judge Cooper, Yamada demonstrated convincingly that he fully expected to manipulate the Court, just as he had previously manipulated the victims of his finan-

* Prior to his sentence by Judge Cooper, Yamada stated to the Court: "Your Honor, after great reflection and introspection I have realized the harm, the devastating effect of my action during 1969, 1970 and 1971; the effect it has had on not only on myself but on my family, both here and in Japan, and I realized then, as I do now, that to make amends I would have to cooperate fully so that these matters can come to some resolution. It is in this spirit that I have devoted as much of my time as requested to the various Government agencies in the past and I intend to do so in the future." (Appendiv B, pp. 12-13) such statement must be viewed as an insincere expression of contrition and a cynical effort to parlay cooperation into a suspended sentence.

cial frauds. Moreover, the letters themselves betray a condescension and a cynicism exactly the opposite of the humane qualities which Yamada sought to present to the Court. In any defendant, such conduct is inexcusable. With respect to a defendant who holds himself out as a contrite cooperating witness, it is especially intolerable. In short, Yamada has demonstrated a cynical disregard for the administration of justice and an attitude that this Court is as vulnerable to deception as any victim of a securities fraud. Such an attitude must not be tolerated.

CONCLUSION

In writing the above, we are mindful of the fact that this Court is especially sensitive to the sentencing process as a focal point of the criminal justice system. The case before the Court presents a cynical abuse of such system by an individual pretending to make his peace with society. For all of the reasons set forth above, the cries to which Akiyoshi Yamada has pleaded guilty should be punished by a substantial term of imprisonment consecutive to the term which the defendant is presently serving.

Respectfully submitted,

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Of Counsel

SUPREME COURT, U. S.

JAN 23 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-913

PHILIP ZANE and JEROME E. SILVERMAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

PHILIP ZANE and JEROME E. SILVERMAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Philip Zane and Jerome E. Silverman pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 4, 1974.

Opinion Below

The opinion of the Court of Appeals, which has not yet been reported, is reprinted as Appendix A, annexed here-

to. No written opinion was rendered by the United States District Court, Southern District of New York; the District Court's oral opinion, rendered from the bench, is reprinted as Appendix B, annexed hereto.

The opinion of the Court below affirmed the District Court's denial of petitioners' motion under Rule 33 of the Federal Rules of Criminal Procedure for a new trial based upon newly discovered evidence. The motion for a new trial was made following the Court of Appeals' affirmance of petitioners' convictions on direct appeal, reported at 495 F.2d 683. Petitioners' application to this Court for a writ of certiorari seeking review of the Court of Appeals' original decision was denied by this Court by Order dated October 21, 1974 (U.S.) (No. 73-1878).

Jurisdiction

The judgment of the Court of Appeals was entered on November 4, 1974. A timely petition for rehearing, with a suggestion for hearing *en banc,* was denied on December 27, 1974 (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the decision of the Court of Appeals, in affirming the District Court's denial of petitioners' motion for a new trial, directly conflicts with a controlling decision of this Court.

Statutory Provisions Involved

Rule 33, Federal Rules of Criminal Procedure

Title 15, United States Code, §78o

Title 15, United States Code, §78ff

Title 18, United States Code, §2

Title 18, United States Code, §371

Title 18, United States Code, §1505

Title 18, United States Code, §1621

17 C.F.R. §240.15d-1

17 C.F.R. §240.12b-20

(The above provisions are set forth in Appendix D annexed hereto).

Statement of Proceedings in the United States District Court for the Southern District of New York

Petitioners Philip Zane and Jerome E. Silverman were charged by indictment in the United States District Court for the Southern District of New York, with others, as follows:

> Count 1 charged a conspiracy among Zane, Silverman, and others (including one Akiyoshi Yamada) to knowingly and wilfully file with the Securities and Exchange Commission (hereinafter "SEC") a false and misleading Form 10-K annual report for Microthermal Applications, Inc. (hereafter "Microthermal") for the fiscal year ending January 31, 1970 (18 U.S.C. §371).
>
> Count 2 charged Zane, Silverman, and others with the substantive offense of knowingly and wilfully

filing (and aiding and abetting the filing of) the false and misleading Form 10-K referred to in Count 1 (15 U.S.C. §78o; §78ff; 17 C.F.R. §§240.15d-1, 240.12b-20; 18 U.S.C. §2).

Count 3 charged Zane and Silverman with obstruction of justice by the submission to the SEC of "fraudulently" prepared documents allegedly designed to "cover up" the receipt by Zane and Silverman of an alleged bribe which they had allegedly received to induce their participation in the offenses charged in Counts 1 and 2 (18 U.S.C. §§ 1505, 2).

Counts 4 and 5, asserted against other defendants, were severed before trial.

Counts 6-12 charged Zane with perjury for testimony given before the SEC in connection with an SEC investigation into the matters specified in Counts 1-3 (18 U.S.C. §1621).

Trial of the action against Zane and Silverman (and against a co-defendant, Robert Persky*) commenced on May 7, 1973 before the Hon. Inzer B. Wyatt and a jury. On June 12, 1973, the jury returned a partial verdict, acquitting petitioners on nine of the thirteen counts charged against them (Counts 1 and 3 as to both petitioners, and Counts 6, 7, 9, 10, and 11 as to petitioner Zane), and reported themselves unable to reach agreement as to the remaining counts. After an *Allen* charge and several more hours of deliberations, the jury returned a second partial verdict, convicting both petitioners on Count 2, and reporting themselves unable to agree as to Counts 8 and 12 against petitioner Zane.

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* Co-defendants Fisher, D'Onofrio and United States Secretarial Institute, Ltd. were severed. Co-defendant Kaplan pleaded guilty to one count.

On September 6, 1973, both petitioners were sentenced to two-year terms on Count 2, with four months to be served in the custody of the Attorney General and two years probation.

During the course of petitioners' direct appeal from the judgment, they learned of material new evidence which had been previously unknown and unavailable to them. Their motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure based upon this newly discovered evidence was denied by the District Court, and the denial was affirmed by the Court of Appeals. It is from this decision of the Court of Appeals that the instant petition is respectfully filed.

Statement of Facts in Support of Petition

Petitioners both testified at trial and denied any knowledge of or participation in the crimes charged against them.

The prosecution's case was built primarily on the testimony of two witnesses, Akiyoshi Yamada and John Galanis. Both witnesses were admitted active participants in the conspiracy, and the issue of fact for the jury was whether to believe or disbelieve their testimony that the petitioners, notwithstanding petitioners' protestations of innocence, were among those who had joined with Yamada and Galanis in the conspiracy. As the Court of Appeals noted in its original opinion affirming petitioners' convictions, "The serpentine course of the conspiracy was traced at trial largely through the testimony of Galanis and Yamada." (495 F.2d at 688). As the Court of Appeals further acknowledged in its opinion affirming the trial Court's denial of petitioners' motion for a new trial, Yamada "gave extensive testimony implicating Zane [and]

Silverman not only on the charge on which they were found guilty but on various other counts on which they were acquitted." (Appendix A, pp. 2a-3a).

Yamada, during the course of his trial testimony, admitted to the commission of numerous securities frauds, all of which were committed before he struck a deal with the Government and became a cooperating witness. In addition, he had committed perjury while testifying before the S.E.C. regarding his various securities frauds. Yamada agreed to plead guilty to three one-count informations before a single judge, with the Government's commitment that he would not be prosecuted for any other offenses. He had not yet been sentenced at the time he testified at petitioners' trial, although he had learned of the lenient (six months plus probation) sentence that his partner in crime, Galanis, had received (T. Tr.* 1574-1596, 1599-1606, 1676-1680).

Shortly after the jury returned its verdict in petitioners' trial, Yamada was indicted by a grand jury in the United States District Court for the Southern District of New York on sixteen counts (74 Cr. 100). In substance, the indictment alleged that Yamada was sentenced (shortly after his testimony and the jury's verdict in the prosecution of petitioners) by the Hon. Irving Ben Cooper to two years' imprisonment, five years' probation, and a $30,000 fine for the various offenses to which Yamada had pleaded guilty as part of his agreement with the Government. The indictment alleged that for the next seven weeks after his sentencing, Yamada engineered and perpetrated a scheme to defraud Judge Cooper "by submitting false, forged, fictitious and fraudulent documents and information to the Court" in connec-

* The designation "T. Tr." followed by a number refers to page numbers of the trial transcript.

tion with a subsequent motion brought by Yamada before Judge Cooper for reduction of sentence. To effect this scheme, Yamada was alleged to have caused the sending of numerous letters to Judge Cooper, by various individuals purportedly active in community services, attesting to Yamada's fine character and previous good deeds, and purportedly requesting that leniency be extended by the Court to Yamada. These letters, according to the indictment, were completely false, forged, and, in at least one instance, typed on stationery whose printing Yamada caused and which bore the name of a non-existent institution. Yamada's scheme as charged was an elaborate and brazen series of lies and fabrications to a United States District Judge in an effort by Yamada to obtain leniency for himself, at whatever cost.

On April 15, 1974, Yamada entered a plea of guilty to six counts of the indictment against him. In substance, the conspiracy count to which Yamada pleaded guilty charged him with having conspired with others, for a fifty-day period beginning about a month after his testimony in petitioners' trial, to defraud the United States and Judge Cooper in Judge Cooper's official capacity as a United States Senior District Judge for the Southern District of New York by submitting false, forged, fictitious, and fraudulent documents in support of his motion for reduction of sentence; Counts 12-16, to which Yamada also pleaded guilty, charged him with five substantive offenses of knowingly and wilfully submitting false, fictitious and fraudulent statements to Judge Cooper in support of his motion for reduction of sentence.

Yamada, before testifying at petitioners' trial, had previously testified under oath before the S.E.C. with respect to (among other things) the same matters about which he testified at trial, except that before the S.E.C. he had testified to his lack of knowledge of the Microthermal con-

spiracy, which would include lack of knowledge of petitioners' alleged involvement in that conspiracy. His testimony before the S.E.C. was completely different from his testimony at petitioners' trial concerning his purported knowledge of petitioners' alleged involvement in the conspiracy, and the jury was faced at trial with the issue of whether Yamada had perjured himself before the S.E.C. (as Yamada and the Government claimed) or was perjuring himself at trial (as petitioners claimed.) See 495 F.2d at 696.

In an attempt to persuade the jury to resolve this issue against Zane and Silverman, Yamada was pictured at trial by himself and by counsel for the Government as being a man who, having violated the laws, was now repentant, entirely credible, and ready to tell the truth and bear whatever punishment was necessary for his previous offenses in order to face life with a fresh start. Government counsel, even before Yamada testified, said in his opening statement to the jury, "Yamada stepped forward and said 'I did these things and I want to pay for these things'" (T. Tr. 58). Indeed, Government counsel in his opening statement anticipated cross-examination by defense counsel into Yamada's deal with the Government by characterizing any such inquiry as "a tremendous amount of wind and air." (T. Tr. 57). Yamada himself testified, "I agreed to tell the absolute truth. . . . I was going to start anew, and start a new life" (T. Tr. 1577). Government counsel, in summation, claimed that the Government's cooperating witnesses (including Yamada), in this and in others of "these financial cases," "finally said, 'Enough, I want to tell the truth'" (T. Tr. 4009-4010), and that Yamada "was honest" and his testimony had "the hallmarks of credibility" (T. Tr. 4015).

As Yamada's crimes immediately after his testimony against petitioners clearly establish, the picture of Ya-

mada which the Government painted at petitioners' trial was entirely false; to the contrary, a grand jury painted Yamada as a liar, and his plea of guilty to six counts of the indictment confirmed the grand jury's allegations and absolutely refuted the claim made by the Government at trial that Yamada was a man worthy of any belief or one whose testimony was worthy of any credence. Moreover, Yamada's guilty plea to six counts furnished unmistakable and overwhelming evidence—unavailable at trial—of the lengths to which Yamada would lie and construct a web of total deceit in order to alleviate his own problems with the law.

In this respect, the Government's position with respect to Yamada's sentencing on the six counts to which he pleaded guilty is of extreme significance. The Government submitted a sentencing memorandum to the Hon. Morris E. Lasker (to whom 74 Cr. 100 had been assigned) which not only urged Judge Lasker to impose a severe punishment on Yamada, but additionally characterized Yamada's newest crimes in terms which clearly warrant the granting of a new trial in the instant case. The Government memorandum stated that the crimes (committed within a short time of his testimony at petitioners' trial) "are matters of the utmost gravity which . . . require a stern response by the Court", and the Government urged that Yamada "should be punished by a substantial term of imprisonment consecutive to the term which [Yamada] is presently serving" (A*52, A67). The Government also stated in its sentencing memorandum that "in addition to the letters set forth in the indictment, the Government

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* The letter "A" followed by a number designates page reference to "Appellants' Appendix" on their appeal to the Court of Appeals from the District Court's denial of their motion for a new trial.

would have proven [at trial] that Yamada solicited additional fake letters" (A60). Moreover, in the Government's sentencing memorandum to Judge Lasker, the Government further stated:

> "[T]he fraud perpetrated by Yamada has substantially vitiated his usefulness as a Government witness in any future prosecutions." (A61)

This was also recognized by Judge Lasker himself, who stated at Yamada's sentencing:

> "it is going to make Mr. Yamada himself less useful as a witness than he would have been otherwise." (A37)

ARGUMENT

The decision of the Court of Appeals directly conflicts with an applicable and controlling decision of this Court.

It is respectfully submitted that the Court of Appeals' decision, in affirming the District Court's denial of petitioners' motion for a new trial, is in direct conflict with a controlling decision of this Court, *Mesarosh* v. *United States*, 352 U.S. 1 (1956).

In *Mesarosh*, petitioners were convicted of a Smith Act violation. While their appeal was pending before this Court, the Solicitor General called this Court's attention to the fact that "the Government, on the information in its possession, now has serious reason to doubt the truthfulness of" testimony given in other judicial proceedings by one of the seven witnesses who had testified against petitioners (352 U.S. at 4). The Solicitor General stated,

however, that the Government's position was still that the testimony of the witness given at petitioners' trial "was entirely truthful and credible" (352 U.S. at 4). Under these circumstances, this Court held:

> "[The witness]'s credibility has been wholly discredited by the disclosures of the Solicitor General. No other conclusion is possible. The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial." 352 U.S. at 9.

The circumstances of the instant case are even more compelling than those of *Mesarosh*. In *Mesarosh*, the Government's witness was discredited only by the Solicitor General's assertion, but not by any conviction, whereas in the instant case Yamada pleaded guilty to six separate crimes constituting a blatant, flagrant, and premeditated series of lies and fabrications to a Federal District Judge. Yamada's crimes followed his testimony at trial by only a matter of weeks. Moreover, in *Mesarosh*, the Solicitor General "was not prepared to say the witness . . . was guilty of perjury" (352 U.S. at 8), whereas Yamada's confessing to his newest crimes are unequivocal proof of Yamada's lies.

Yamada's new convictions are relevant to his credibility not only in the narrow sense that any conviction of a crime bearing on veracity is relevant (cf. *United States* v. *Palumbo*, 401 F. 2d 270 (2d Cir. 1968), cert. denied 394 U.S. 94); more significantly, under the circumstances of the instant case Yamada's crimes against the Court were intimately connected with the primary issue of his motivation to lie at the trial of Zane and Silverman. The

jury in this case had to evaluate the extent to which Yamada would lie in order to lessen his own punishment, and the extent to which he had finally decided, in the words spoken by Government counsel to the jury, to "step forward and s[ay] 'I did these things, and I want to pay for these things'" (T. Tr. 58). Yamada's newest crimes constitute overwhelming proof that Yamada, even after having purportedly turned over a new leaf and having become an honest man, so deeply wished to escape punishment that he would create an absolutely fictitious series of lies and deceits towards this end, even to the extent of violating the sanctity of a Federal Court. The picture of Yamada which was painted at trial as that of a repentant man who had decided to tell the truth and bear his punishment was, in a word, untrue. This evidence, previously unavailable, would have proven to the jury the extent of Yamada's desperation, and the outrageous extent to which Yamada would create a total fiction out of thin air to try to help himself.

Moreover, Yamada's newest crimes are firm evidence that he would not and did not live up to his bargain with the Government. He testified at trial that pursuant to his bargain with the Government "I agreed to tell the absolute truth" and that he intended to live up to his agreement (T. Tr. 1577). However, as the Government's sentencing memorandum before Judge Lasker stated, "the very crimes which are the subject of the instant charges demonstrate that Yamada violated his agreement with the Government almost as soon as he had made it" (A61). In fact, Yamada's violation of his agreement with the Government was so flagrant that the Government "considered prosecuting this defendant for his various unprosecuted frauds" which the Government had previously agreed not to prosecute (A61).

The District Court, in denying petitioners' motion for a new trial, relied for its holding on the assertion that Yamada's new crimes "seem to me to be cumulative on impeaching his credibility", for the reason that the scope of Yamada's previous criminal offenses had been brought to the jury's attention during the course of petitioners' trial. Notwithstanding this rationale of the District Court, however, it is respectfully submitted that Yamada's new crimes are not simply cumulative to his other crimes. There was absolutely no evidence presented or available at trial to show that he had been convicted of any other crime or had committed or contemplated any other misconduct after having allegedly turned over a new leaf; nor was there any evidence adduced at trial that he had made any other false statements after having allegedly reformed himself; certainly there was no admission from Yamada as to any instance of his having wilfully made material false statements after his purported reformation. The picture of Yamada painted by the Government at trial was that of a man who, having made his plea bargain with the Government around mid-1972, was a truth-telling man who by the time of trial had reformed and was worthy of belief; the thrust of petitioners' defense to Yamada's testimony was that he was motivated to testify as he did by an eagerness to extend the scope of his "cooperation" with the Government and thereby reduce his own punishment for his previous offenses. The prosecution's portrayal of a reformed Yamada turned out to be blatantly untrue, as Yamada's new crimes established him to be a criminal so desperate to mitigate his own punishment as to be willing to fabricate any series of lies no matter how outrageous or fictitious so long as those lies were perceived by Yamada to be helpful to himself. Yamada himself, at his sentencing before Judge Lasker, finally admitted the depths of his desperation: " . . . I was irrational of every conceivable fear concerning prison life . . . " (A45).

Indeed, the District Court itself, in denying petitioners' motion for a new trial, conceded that Yamada had been portrayed by both himself and the Government at petitioners' trial as being a repentant man now worthy of belief. As the District Court acknowledged in its oral statement denying the motion for a new trial:

> "[C]ounsel for the defendants are right in saying that as of the time of trial he was saying in substance that he had reformed, and was then telling the truth . . ."

The Court's own questioning of Yamada during the trial highlighted this; when counsel for petitioners confronted Yamada with a portion of Yamada's S.E.C. testimony which was inconsistent with Yamada's trial testimony, the following colloquy occurred between the Court and Yamada:

> "Q. Was that at a time when you were giving false answers to the S.E.C.?
> A. That is correct." (T. Tr. 1630)

That the picture of a reformed Yamada painted by the Government at petitioners' trial was untrue is further borne out by Yamada's sentencing proceedings before Judge Lasker. There, Yamada's counsel, in Yamada's presence, stated:

> "Of critical importance is the fact that the crimes committed to which he stands sentenced today all occurred all prior to his imprisonment in Allenwood [which was subsequent to Yamada's testimony at appellants' trial]. I respectfully submit to this Court that he is a different man today. He is a different and rehabilitated man today then he was when he committed these crimes and then he

> was when he stood before Judge Cooper [which was also subsequent to Yamada's testimony at appellants' trial]." (A33)
>
> "We have a different man before this Court today than the man who wrote those letters" (A40).
>
> "[H]e is a different man than what he was when he submitted those letters to the Court. . . . [W]e have a man that is contrite and rehabilitated." (A44)

Indeed, the Government's own sentencing memorandum submitted to Judge Lasker indicated the Government's recognition of the absolute falsity of Yamada's alleged reformation and contrition as of the time Yamada testified at petitioners' trial. As the Government's memorandum stated:

> "[T]he fraud perpetrated by Yamada upon the Court represents the antithesis of cooperation or of genuine contrition for his past fraudulent activities. . . . [T]he fraud set forth above was anything but a frenzied last-minute act of panic. It was a calculated, well-thought out plan to deceive the court." (A62)
>
> "In submitting the fraudulent letters to Judge Cooper, Yamada demonstrated convincingly that he fully expected to manipulate the Court, just as he had previously manipulated the victims of his financial frauds." (A65).
>
> "With respect to a defendant who holds himself out as a contrite cooperating witness, it is especially intolerable." (A66)

Thus, the District Court, Yamada's counsel (in Yamada's presence), and the Government itself have all recog-

nized that Yamada, previous to his crimes before Judge Cooper—and including the time of his testimony against petitioners—held himself out as a repentant, contrite man ready to atone for his past crimes and worthy of credibility, and that this has been demonstrated beyond doubt to be completely false. Under these circumstances, it is respectfully submitted that Yamada's acts subsequent to his trial testimony can in no realistic sense be regarded as cumulative to his other crimes, as each of those other crimes was committed prior to his purported reformation, and there was no evidence available or introduced at trial to indicate that his contrition was, as it has subsequently been exposed to have been, a total fraud.

In addition, Yamada's scheme before Judge Cooper precisely paralleled what petitioners Zane and Silverman maintained at trial was his scheme against them. The Government, in its sentencing memorandum against Yamada, set forth at length certain comments made by Judge Cooper in imposing the original sentence upon Yamada. Judge Cooper, in imposing the original sentence, had stated to Yamada that a significant factor which Judge Cooper felt justified a two-year sentence was the fact that no testimonials had been presented to the Court on Yamada's behalf with respect to sentencing. Judge Cooper stated to Yamada:

> "[T]here are not testimonials such as was present yesterday [in a different case then pending before Judge Cooper] of moral deportment over a substantial period of time that came to stand besides those who had to stand sentencing yesterday. You haven't got them. They are not here. I can't look to a Yamada who did things of quality, who lent aid to those who were suffering; who dedicated a

period of time to uplift the neglected, the tormented. Absent." (A54)

The Government in its sentencing memorandum before Judge Lasker pointed out that in view of Judge Cooper's comments, Yamada "decided to concoct evidence of such charity in order to persuade Judge Cooper to reduce the two-year sentence." (55). The Government further stated in its sentencing memorandum that Yamada's "letters betray a deliberate effort to fabricate information which Yamada knew would commend themselves to Judge Cooper's attention." (A56).

The Government's argument to Judge Lasker regarding Yamada's fabrications in order to satisfy what Yamada felt was a need to supply testimony where none existed exactly paralleled petitioners' explanation for Yamada's testimony at trial. Based upon Yamada's testimony before the S.E.C. and his previous statements, it was petitioners' position that Yamada's testimony with respect to the Microthermal conspiracy and petitioners' alleged involvement therein was simply his attempt to broaden the scope of his "cooperation" with the Government in order to get the best possible deal for himself. In short, petitioners' position was that Yamada had testified truthfully before the S.E.C. with respect to his lack of knowledge concerning this conspiracy, and was committing perjury at trial—not, as Yamada claimed at trial, vice-versa. It is significant that Yamada himself admitted that he had not made his deal with the Government until mid-1972; that he knew, as of the time he made his deal, that Galanis had already accused two accountants named Zane and Silverman of participation in the Microthermal conspiracy; and that by virtue of having been served with an S.E.C. civil complaint which detailed, among other things, the alleged Microthermal conspiracy, Yamada knew of the al-

leged role which Galanis had ascribed to Zane and Silverman in Galanis' conversations with the S.E.C. attorneys (T. Tr. 1607-1610).

Thus, Yamada's lies to Judge Cooper, which the Government characterized as an attempt to supply false evidence where Yamada felt it could be helpful to him personally, were of extraordinary relevance to the position urged by petitioners at trial as to the depths of Yamada's motivation to supply false testimony and invent false relationships and non-existent events in order to fill what Yamada perceived as a vacuum.

The Court of Appeals' opinion disposes of this Court's *Mesarosh* decision with the observation that *Mesarosh*

> "did not involve a defense motion for a new trial but rather a sui generis exercise by the Supreme Court of its supervisory jurisdiction at the instance of representation submitted by the Solicitor General." (See Appendix A, at page 6a thereof.)

It is respectfully submitted that this overlooks the following controlling similarities between the two cases: in both cases the witnesses' credibility was wholly discredited by the new disclosures (in the instant case the disclosures were confirmed by Yamada's plea of guilty, whereas in *Mesarosh* the disclosure merely represented the Solicitor General's opinion); in both cases the new disclosures related directly to the witnesses' trial testimony (Yamada having claimed to be a reformed, now-honest man, an assertion for which the prosecutor vouched); and in both cases, the witnesses' lies were made in judicial proceedings. Moreover, this Court granted the accused a new trial in *Mesarosh* even in the absence of substantial additional circumstances which are present in the instant case: here, Yamada's perjury was committed within just

a few weeks of his testimony against petitioners (whereas in *Mesarosh* certain of the witness' lies were years removed from his trial testimony); and here, the evidence of Yamada's newest crimes bore directly upon Yamada's motive to lie at petitioners' trial, as it was undisputed that *both* during petitioners' trial and during the motion to reduce his own sentence before Judge Cooper, Yamada had been informed of what testimony might prove fruitful to Yamada in mitigating his own punishment.

The Court of Appeals' opinion, in attempting to distinguish *Mesarosh,* refers to none of these substantial similarities. The one purported distinction between the two cases upon which the Court of Appeals relies is that *Mesarosh* "did not involve a defense motion for a new trial" but an exercise of the Supreme Court's supervisory power "at the instance of representation submitted by the Solicitor General." (It is respectfully submitted that this is a distinction without a difference. The only conceivable relevance of whether the representation of the witness' perjury is made by the Government or by the defense is the degree of certainty of the perjury charged. In this case the newly discovered evidence which demonstrates the falsity of Yamada's testimony concerning his purported honesty, reformation, and veracity, although disclosed to the Court by the defense, was made by accusation of a federal grand jury acting under the guidance of the United States Attorney and was confirmed by Yamada's plea of guilty to six counts, whereas in *Mesarosh* the accusations against the Government's witness rested only upon the Solicitor General's assertions. Finally, in *Mesarosh* the Solicitor General stated to the Court that "the testimony given by [the Government witness] at the trial was entirely truthful and credible" (352 U.S. at 4); in the instant case, to the contrary, the United States Attorney has never stated subsequently to Yamada's most recent

indictment that Yamada's trial testimony was credible, or that Yamada will be called as a Government witness in any other cases in which he had been scheduled to testify for the Government; to the contrary, the Government has admitted that the new disclosures against Yamada have "substantially vitiated his usefulness as a Government witness in any future prosecutions." (A 61). The Government's reluctance to stand behind Yamada's credibility at this point is understandable, as Yamada's alleged credibility and reformation were thoroughly demonstrated by Yamada's own plea of guilty to have been blatantly false. Thus, in view of the certainty of the evidence of Yamada's new crimes, its disclosure to the Court by the defense rather than by the Government is a factor of no significance. *United States* v. *Chisum*, 436 F.2d 645 (9th Cir. 1971).

In view of these circumstances, it is respectfully submitted that petitioners Zane and Silverman are entitled to a new trial. Cf. *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956). Yamada's most recent crimes cast substantial doubt on the validity of petitioners' conviction on the one count apiece (out of thirteen charged) upon which they were found guilty.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

APPENDIX A

Decision and Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 110, 114—September Term, 1974.

(Argued October 1, 1974 Decided November 4, 1974.)

Docket Nos. 74-1678, 74-1839

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

PHILIP ZANE, JEROME E. SILVERMAN, and ROBERT S. PERSKY,

Defendants-Appellants.

Before:

MEDINA, ANDERSON and MANSFIELD,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge.*

Philip Zane, Jerome E. Silverman and Robert S. Persky appeal from an order denying a motion for a new trial on the ground of newly discovered evidence.

Affirmed.

Appendix A

JAMES E. NESLAND, Assistant United States Attorney, New York, N. Y., (Paul J. Curran, United States Attorney for the Southern District of New York, and John D. Gordan III, Assistant United States Attorney, New York, N. Y., on the brief), *for Plaintiff-Appellee.*

SANDOR FRANKEL, New York, N.Y., (Louis Bender, New York, N. Y., on the brief), for *Defendants-Appellants Philip Zane and Jerome E. Silverman.*

JOHN LOGAN O'DONNELL, New York, N. Y., (Charles M. McCaghey, Stephen Schlessinger and Olwine, Connelly, Chase, O'Donnell & Weyher, New York, N. Y., on the brief), *for Defendant-Appellant Robert S. Persky.*

MEDINA, *Circuit Judge*:

On June 13, 1973 Philip Zane, Jerome E. Silverman and Robert S. Persky, two accountants and a lawyer, were convicted after a five-week trial to Judge Wyatt and a jury on one count of a multi-count indictment for filing a false Form 10K Annual Report for Microthermal Applications, Inc. with the SEC. We affirmed 495 F.2d 683, *cert. denied*, 43 U.S.L. Week 3239 (U.S. October 22, 1974). One of the defendants, Akiyoshi Yamada, pleaded guilty to a one-count indictment charging conspiracy to file the false report and he co-operated with the government. He gave extensive testimony implicating Zane, Silverman and Persky not only on the charge of which they were found guilty but on various other counts on which they were

acquitted. Less than four weeks after the conviction of Zane, Silverman and Persky, Yamada came before Judge Cooper on a motion to reduce the sentence imposed on him for the crime to which had pleaded guilty. In support of this motion five letters purportedly written by persons active in community affairs were submitted by Yamada to Judge Cooper. These letters, which testified to Yamada's good character and praised his work with drug addicts, were written by Yamada himself to influence Judge Cooper. Claiming that proof that Yamada had forged these letters and that he had engaged in such fraudulent and criminal conduct constituted newly discovered evidence, Zane, Silverman and Persky made a motion for a new trial, pursuant to Rule 33, Fed. R. Crim. P. Judge Wyatt denied the motion from the bench remarking that Yamada's credibility had been fully explored at the trial, that the sending of the letters was merely cumulative evidence by way of impeachment and that such proof had no relevance to the issue of the filing of the false report with the SEC. He also found there was no probability that on a new trial with the benefit of the evidence concerning the fraudulent letters a new jury would reach a different conclusion with respect to the guilt of these appellants. This appeal is from the order of Judge Wyatt denying the motion for a new trial.

It requires no more than a brief recital of the law in this Circuit governing the function of the trial judge and that of this Court in connection with Rule 33 motions for a new trial on alleged newly discovered evidence to dispose of this appeal. In the exercise of his discretion the trail judge must determine whether there is a showing: (1) that the evidence could not with due diligence have been discovered until after the trial; (2) that the evidence

is material to the factual issues at the trial and not merely cumulative and impeaching, and (3) that the evidence would probably produce a different result in the event of a new trial. *United States* v. *Birrell*, 482 F.2d 890, 892 (2d Cir. 1973); *United States* v. *DeSapio*, 456 F.2d 644, 647 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972); *United States* v. *Polisi*, 416 F.2d 573, 576-577 (2d Cir. 1969). Less exacting standards, not relevant here, are required in cases involving prosecutorial misconduct or negligence. See, *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). The function of the Court of Appeals is to decide whether the trial judge has applied these criteria and whether his finding that the application of these criteria required a denial of the motion is or is not clearly erroneous. It is not our function to speculate on the possibility that a jury on a new trial might acquit the defendants. As we conclude that Judge Wyatt applied the proper criteria and that there is no tenable basis for holding that Judge Wyatt abused his discretion, or that his finding in applying the criteria was clearly erroneous, we affirm the order appealed from. It is especially important that this separate consideration of the respective functions of the trial judge and of an appellate court be made in Rule 33 cases involving long complicated trials.

It is obvious that the evidence of the forgery and sending of the letters was cumulative on the issue of credibility and that it had no bearing on the issue of whether or not appellants were guilty of filing the false report with the SEC. Yamada had a lengthy history of involvement in fraudulent securities schemes. Prior to the trial of the appellants, Yamada pleaded guilty to three one-count indictments, one of which concerned the conspiracy to file a

false annual report for Microthermal. In return for co-operation with the government in the prosecution of the appellants, it was understood that the government would not proceed on other criminal offenses committed by Yamada, and also that the government would advise the court of his co-operation at the time of sentencing. At the trial. Yamada was subjected to thorough cross-examination. The basis of Yamada's co-operation, the criminal charges, and his numerous fraudulent securities schemes were brought out to impeach his credibility. In addition, Yamada testified to destroying documents and giving perjurious testimony before the SEC in the course of its investigation into Microthermal.

In support of his finding that the evidence of the forged letters would probably not result in any different decision by the jury on a new trial, Judge Wyatt referred to his recollection of the proofs and his instructions to the jury. We find no reason to disturb a finding based upon such reasoning. We are not persuaded that a new jury would decide the case differently if it knew that Yamada's claim at the first trial that he had reformed and turned over a new leaf was false. Indeed, at the time of the first trial he may have thought he had reformed.

Nevertheless, as we understand their arguments, appellants would have us develop some new law because of what they call the special circumstances of this case. Again and again appellants would have us reverse the decision below because Yamada's testimony at the trial and his forgery of the letters were supposed to be part and parcel of a deep-seated determination to resort to any means to keep out of jail. This is indeed novel doctrine and it would result in new trials whenever after a criminal trial the conduct of a defendant-turned-govern-

ment-witness indicated a desire to escape the toils of justice by any form of lying or skulduggery that could be made to appear similar to the alleged giving of false testimony at the trial in the hope of obtaining consideration for his co-operation with the prosecution.

Mesarosh v. *United States,* 352 U.S. 1 (1956), gives no support to the contentions of appellants here. It did not involve a defense motion for a new trial but rather a *sui generis* exercise by the Supreme Court of its supervisory jurisdiction at the instance of representation submitted by the Solicitor General.

The appellants place great emphasis on the fact that the forged and fictitious letters were submitted shortly after the conclusion of the trial resulting in the conviction of the appellants. This fact, however, does not alter the cumulative and impeaching character of these disclosures, nor does it provide an appropriate basis to distinguish this situation from other cases involving Rule 33 motions.

Affirmed.

APPENDIX B

Oral Opinion of Judge Wyatt

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
73 Crim. 192

UNITED STATES OF AMERICA,

—against—

PHILIP ZANE, JEROME SILVERMAN, *et al.*,

Defendants.

The Court: It seems as if we are back to almost a year ago because I can remember Mr. Frankel and Mr. O'Donnell making arguments which were terribly persuasive in making one to decide in accordance with their arguments, but it frequently turned out that I didn't feel able to do so.

I have given this a good deal of consideration and I have read all the papers even the pleadings, and including the papers submitted this afternoon. However, I do not think I can grant this motion.

There are two motions, but they raise the same point, and that is that the admitted fraud of Yamata on Judge Cooper after his testimony at the trial in our case re-

quires a new trial. But, as I have said a moment ago, the situation here is that Yamata, of course, was not the only witness for the government.

As I have ample cause to remember—but I have not reread the transcript—his credibility was attacked and severely attacked and ably attacked, as was perfectly proper, and he was shown to be an accomplice, an admitted perjurer, and guilty of criminal offenses, and counsel for the defendants are right in saying that as of the time of trial he was saying in substance that he had reformed, and was then telling the truth, where shortly thereafter, he was back committing, in substance, perjury. I understand. Your points are well made.

But I still believe that since his credibility, as the Court of Appeals said, was thoroughly explored: the jury had before it the various felony charges that had been made against Yamata, the pleas of guilty, his perjury before the SEC, his hopes of leniency, and they were dealt with not only in his testimony but in summation, and I remember in my charge I gave—I have to say "standard" instructions, but I do have a usual formulation as to accomplice testimony and to testimony of those with prior criminal convictions, and I did call to the attention of the jury the fact the Yamata was an accomplice, that he had criminal records.

I know that I said also that he was an admitted perjurer; I think I may have done that at the request of one or more of the defendants. I told the jury that the testimony of accomplices and of those with criminal convictions and of those who admitted perjury should be viewed with great caution and scrutinized carefully, so I certainly impressed it on the jury what they had to do in weighing Yamata's testimony.

Appendix B

Therefore, it seems to me despite able presentation this afternoon, what he did before Judge Cooper, which seems not only fraudulent but foolish, but still, whatever it is, it seems to me to be cumulative on impeaching his credibility.

As I indicated, I have studied Mesarosh and certainly counsel for the defendants should have brought it to my attention. I do not think I knew the case before.

However, accepting the opinion of the Court, as I must, despite the three dissents, I must conclude that this is one of those instances to which the Court refers at 352 U.S. 9 where untruthful statements by a government witness subsequent to the trial are offered in support of a motion for a new trial as newly discovered evidence affecting his credibility at trial, and then, as I am sure you gentlemen have already read, the Court says, "such an allegation by the defense ordinarily will not support a motion for a new trial because new evidence which is merely cumulative for impeaching, is not, according to the often repeated statement of the Courts, an adequate basis for the grant of a new trial."

Therefore, I feel obliged to deny these motions, and since my statement of my reasons have been made a part of the stenographic transcript, I will simply, in due course, endorse the motion papers: motion denied for reasons stated in open Court.

Thank you very much, gentlemen, for coming.

APPENDIX C

Order of the United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of December, one thousand nine hundred and seventy-four.

Present:

HON. HAROLD R. MEDINA,
HON. ROBERT P. ANDERSON,
HON. WALTER R. MANSFIELD,
Circuit Judges.

74-1678
74-1839

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MORTON S. KAPLAN, PHILIP ZANE, JEROME E. SILVERMAN, CHARLES J. FISCHER, ROBERT S. PERSKY, RAMON N. D'ONOFRIO, U. S. SECRETARIAL INSTITUTE, LTD.,

Defendants,

JEROME E. SILVERMAN, PHILIP ZANE, ROBERT S. PERSKY,

Defendants-Appellants.

Appendix C

A petition for a rehearing having been filed herein by counsel for the appellants, Jerome E. Silverman and Philip Zane,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
A. Daniel Fusaro
Clerk

Appendix C

Order of the United States Court of Appeals Denying Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of December, one thousand nine hundred and seventy-four.

74-1678

74-1839

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MORTON S. KAPLAN, PHILIP ZANE, JEROME E. SILVERMAN, CHARLES J. FISCHER, ROBERT S. PERSKY, RAMON N. D'ONOFRIO, U. S. SECRETARIAL INSTITUTE, LTD.,

Defendants,

JEROME E. SILVERMAN, PHILIP ZANE, ROBERT S. PERSKY,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

counsel for the Appellants, Jerome E. Silverman and Philip Zane, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

WILFRED FEINBERG
Acting Chief Judge

APPENDIX D

Federal Rules of Criminal Procedure

RULE 33. NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Appendix D

Statutory Provisions Involved

Title 15, United States Code, §78o

Over-the-counter markets; registration of brokers; information and reports

. . . (d) Each issuer which has filed a registration statement containing an undertaking which is or becomes operative under this subsection as in effect prior to August 20, 1964, and each issuer which shall after such date file a registration statement which has become effective pursuant to the Securities Act of 1933, as amended, shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to section 78m of this title in respect of a security registered pursuant to section 78l of this title. The duty to file under this subsection shall be automatically suspended if and so long as any issue of securities of such issuer is registered pursuant to section 78l of this title. The duty to file under this subsection shall also be automatically suspended as to any fiscal year, other than the fiscal year within which such registration statement became effective, if, at the beginning of such fiscal year, the securities of each class to which the registration statement relates are held of record by less than three hundred persons. For the purposes of this subsection, the term "class" shall be construed to include all securities of an issuer which are of substantially similar character and the hold-

ers of which enjoy substantially similar rights and privileges. Nothing in this subsection shall apply to securities issued by a foreign government or political subdivision thereof.

Title 15, United States Code, §78ff

Penalties

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78*o* of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every

day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) The provisions of this section shall not apply in the case of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 78*o* of this title, except a violation which consists of making, or causing to be made, any statement in any report or document required to be filed under any such rule or regulation, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact.

Title 18, United States Code, §2

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18, United States Code, §371

Conspiracy to commit offense or to defraud United States

Appendix D

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Title 18, United States Code, §1505

Obstruction of proceedings before departments, agencies and committees

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with

any civil investigative demand duly and properly made under the Antitrust Civil Process Act or section 1968 of this title willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 18, United States Code, §1621

Perjury generally

Whoever having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be

fined not more than $2,000 or imprisoned not more than five years or both. This section is applicable whether the statement or subscription is made within or without the United States.

17 C.F.R. §240.15d-1

Requirement of annual reports.

Every registrant under the Securities Act of 1933 shall file an annual report, on the appropriate form authorized or prescribed therefor, for the fiscal year in which the registration statement under that Act became effective and for each fiscal year thereafter, unless the registrant is exempt from such filing by section 15(d) of the Securities Exchange Act of 1934. Annual reports shall be filed within the period specified in the appropriate report form. At the time of filing the annual report, the registrant shall pay to the Commission a fee of $250, no part of which shall be refunded.

17 C.F.R. §240.12b-20

Additional information.

In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-824

ROBERT S. PERSKY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-913

PHILIP ZANE AND JEROME E. SILVERMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were improperly denied a new trial on the basis of newly discovered evidence.

After a five-week jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of filing a false Form 10K Annual Report with the Securities and Exchange Commission, in violation of 15 U.S.C. 78*o* and 78ff. Each petitioner was sentenced to two years' imprisonment, with four months to be served in a penal institution and

with execution of the remainder of the sentence suspended, subject to probation for a period of two years following release from custody. The court of appeals affirmed in a thorough opinion. 495 F.2d 683. This Court denied certiorari on October 21, 1974 (Nos. 73-1878 and 73-1901). Petitioners then filed motions for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The motions were denied by the district court, and the court of appeals affirmed in an opinion on which we principally rely (Persky Pet. App. 1a-8a; 507 F.2d 346).

1. Petitioners based their motions for a new trial on what they allege to be newly discovered evidence relating to the credibility of Akiyoshi Yamada, one of the witnesses on behalf of the government at their trial. Yamada had been indicted with petitioners but pleaded guilty to a single count in that indictment and in two other indictments and testified against them. The other counts against him were dismissed. The factual predicate of petitioners' claim for a new trial was described by the court of appeals as follows (Persky Pet. App. 2a-3a):

> [Yamada] gave extensive testimony implicating Zane, Silverman and Persky not only on the charge of which they were found guilty but on various other counts on which they were acquitted. Less than four weeks after the conviction of Zane, Silverman and Persky, Yamada came before Judge Cooper on a motion to reduce the sentence imposed on him for the crime to which he had pleaded guilty. In support of this motion five letters purportedly written by persons active in community affairs were submitted by Yamada to Judge Cooper. These letters, which testified to Yamada's good character and praised his work with drug addicts, were written by Yamada himself to influence Judge Cooper.

> Claiming that proof that Yamada had forged these letters and that he had engaged in such fraudulent and criminal conduct constituted newly discovered evidence, Zane, Silverman and Persky made a motion for a new trial, pursuant to Rule 33, Fed. R. Crim. P. Judge Wyatt denied the motion from the bench remarking that Yamada's credibility had been fully explored at the trial, that the sending of the letters was merely cumulative evidence by way of impeachment and that such proof had no relevance to the issue of the filing of the false report with the SEC. He also found there was no probability that on a new trial with the benefit of the evidence concerning the fraudulent letters a new jury would reach a different conclusion with respect to the guilt of these appellants.

After analyzing the facts in light of the standards for ruling on motions pursuant to Rule 33,[1] the court of appeals correctly concluded (Persky Pet. App. 4a-5a):

> It is obvious that the evidence of the forgery and sending of the letters was cumulative on the issue of credibility and that it had no bearing on the issue of whether or not appellants were guilty of filing the false report with the SEC. Yamada had a lengthy history of involvement in fraudulent securities schemes. Prior to the trial of the appellants, Yamada pleaded guilty to three one-count indictments, one

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[1] In exercising its discretion, the district court must determine whether with due diligence the evidence could have been discovered prior to or during trial, whether the evidence is material to the issues at trial and not merely cumulative and impeaching and whether the evidence would probably produce a different result at trial. *United States* v. *Birrell*, 482 F.2d 890, 892 (C.A. 2); *United States* v. *DeSapio*, 456 F.2d 644, 647 (C.A. 2); certiorari denied, 406 U.S. 933; *United States* v. *Polisi*, 416 F.2d 573, 576-577 (C.A. 2).

of which concerned the conspiracy to file a false annual report for Microthermal. In return for cooperation with the government in the prosecution of the appellants, it was understood that the government would not proceed on other criminal offenses committed by Yamada, and also that the government would advise the court of his co-operation at the time of sentencing. At the trial, Yamada was subjeted to thorough cross-examination. The basis of Yamada's cooperation, the criminal charges, and his numerous fraudulent securities schemes were brought out to impeach his credibility. In addition, Yamada testified to destroying documents and giving perjurious testimony before the SEC in the course of its investigation into Microthermal.

In support of his finding that the evidence of the forged letters would probably not result in any different decision by the jury on a new trial, Judge Wyatt referred to his recollection of the proofs and his instructions to the jury. We find no reason to disturb a finding based upon such reasoning. We are not persuaded that a new jury would decide the case differently if it knew that Yamada's claim at the first trial that he had reformed and turned over a new leaf was false. Indeed, at the time of the first trial he may have thought he had reformed.[2]

Petitioners rely on this Court's decision in *Mesarosh* v. *United States,* 352 U.S. 1, in support of their contention that they are entitled to a new trial. This

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[2]See also the oral opinion of the trial judge reproduced at Persky Pet. App. 6a-8a.

reliance is misplaced. In *Mesarosh*, the credibility of a government witness in a series of internal security cases became an issue when the Solicitor General informed this Court that the government had reason to doubt his truthfulness based on the testimony he had given at other trials. Exercising its supervisory role over the federal courts, this Court overturned Mesarosh's conviction, since the witness's credibility "has been totally discredited by the disclosures of the Solicitor General." 352 U.S. at 9. Unlike the situation in *Mesarosh*, Yamada's credibility was always at issue in this case and his role and interests were clearly before the jury, which is the ultimate judge of the evidence. Yamada was subjected to extensive cross-examination which revealed his past involvement in fraudulent securities schemes and the criminal charges against him in this case. The fact that he later sought to perpetrate a fraud on the court in connection with his sentence did not add measurably to the understanding of his basic character and credibility, which had been exhaustively examined at trial.

Petitioners argue that the decision of the court of appeals in this case conflicts with the decision of the Ninth Circuit in *United States* v. *Chisum*, 436 F.2d 645. In that case, involving sales of narcotics, the conviction was found to have been based entirely on the testimony of the purchaser, a federal narcotics agent who later pleaded guilty to giving false testimony in a similar narcotics case (*id.* at 647-648). The decision of the court of appeals to grant a new trial in that case does not conflict with the decision below, since here, as the district court pointed out (Persky Pet. App. 7a), Yamada was not the only witness for the prosecution. Moreover, Yamada was not a government agent, nor was he convicted of giving false testimony as a witness against other offenders.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.